

Court Sanctioned Mediation in Cases of Acquaintance Rape: A Beneficial Alternative to Traditional Prosecution

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I. INTRODUCTION

*Short of homicide, [rape] is the "ultimate violation of self."*¹

Unfortunately, rape is an issue that still pervades American society.² In the United States, a person is sexually assaulted every two minutes.³ Rape leaves a woman with short-term and long-term psychological harm.⁴ Although the problem of rape is prevalent, the criminal justice system is not equipped to manage the problem effectively. Even in the rare case that a rape is reported, prosecution is rarely successful.⁵ Incorporating mediation into

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¹ Florida Star v. B.J.F. 491 U.S. 524, 542 (1989) (White, J., dissenting) (disagreeing with the plurality that the names of rape victims could be released in the media if the government did so erroneously) (citing Coker v. Georgia, 433 U.S. 584, 597 (1977) (White, J.) (ruling that the death penalty in rape cases violates the Eighth Amendment)).

² GREGORY M. MATOESIAN, REPRODUCING RAPE: DOMINATION THROUGH TALK IN THE COURTROOM 5 (1993) ("Rape is a widely prevalent and highly systematic aspect of American social life—a social fact."). While acknowledging that males are victims of rape, this Note will focus on women because over ninety percent of rape victims are women. Callie Marie Rennison, *Rape and Sexual Assault: Reporting to Police and Medical Attention, 1992–2000*, BUREAU OF JUSTICE STATISTICS: SELECTED FINDINGS, Aug. 2002, at 1, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/rsarp00.pdf> (last visited Jan. 26, 2004) (stating that ninety-four percent of completed rape victims were women and ninety-one percent of attempted rape victims were women).

³ Christina Stephens, *Justice of the Accused, but not the Rape Victim*, THE REVEILLE, Nov. 28, 2001 (via University Wire) (citing the Rape and Incest National Network).

⁴ See PAT GILMARTIN, RAPE, INCEST, AND CHILD SEXUAL ABUSE: CONSEQUENCES AND RECOVERY 157–270 (1994) (discussing the consequences of suffering from rape and the issues involved in treating the victim); see also United States v. Morrison, 529 U.S. 598, 628–37 (2000) (discussing the impact of rape on women).

⁵ Oftentimes a jury will not convict because of the "he said, she said" problem of evidence in acquaintance rapes. See Deborah Gartzke Goolsby, Note, *Using Mediation in Cases of Simple Rape*, 47 WASH. & LEE L. REV. 1183, 1192 (1990) ("In this circumstance, a jury generally will acquit or, if allowed to do so, convict the defendant of

the criminal justice system for cases of rape will lead to more victims reporting the crime and more perpetrators being brought to justice *and* receiving rehabilitative care.

Society addresses rape through the criminal justice system, and society's approach to rape in this context has evolved over time. For example, defining rape as a component of sexual assault was an important development in the process.⁶ However, the current system of justice is not effectively dealing with the issues of rape and does not enable women to reap the benefits of the criminal justice system.⁷ This Note proposes that victim-offender mediation is a reasonable alternative to the traditional approach to criminal prosecution in certain types of rape cases.⁸

Part II of this Note will explore the issues of rape, detailing the statistics associated with rape in the United States and the way in which rape has been defined including the traditional legal definition. Additionally, Part II will explain the evolution of the law regarding rape and its implications for victims. Part III of this Note explains restorative justice and one of its most common applications, victim-offender mediation. Following the explanation of restorative justice and the operation of victim-offender mediation, Part IV will explain how cases of acquaintance rape are best handled through a

a lesser charge than rape. In fact, one study revealed a jury conviction rate for simple rape [acquaintance rape] of only three out of forty-two cases.”).

⁶ STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* 104-05 (1998) (explaining issues involved in the terminology of rape).

The question immediately arises whether a criminal offense for violating sexual autonomy should be called “rape,” “sexual assault,” or something else entirely. Usually the judgment about how to name our offense categories is of little practical interest. In property crimes the labels used are neither uniform nor important. In sexual crimes, however, the labeling decision may be very important. A persistent pitfall of rape reform has been the tenacity of common culture and its influence over the interpretation of ambitious reforms. Rape reformers have paid close attention to labels but have disagreed sharply over the best approach.

Id. at 104 (citations omitted). For purposes of this Note, rape and sexual assault will be considered synonymous.

⁷ See *infra* Part II.

⁸ Mediation may be used in addition to tradition criminal prosecution, in lieu of criminal prosecution, or in conjunction with criminal prosecution. Mediation in conjunction with prosecution is operationalized as mediation between the victim and prosecutor with the defendant and his attorney. Mediation is rarely used in rape cases in the ways proposed by this Note. See Tom Witosky, *Pierce Deal: Positive Step for Victims?*, DES MOINES REGISTER, Nov. 11, 2002, at 5A (“Mediation is used in some criminal cases but not very often, and I know of no case in which it was used in a sexual-assault case in this way,” said Andrea Charlow, a mediation expert at the Drake University Law School.”).

process of mediation based on the theory of restorative justice. In the first instance that mediation is proposed, the victim and the offender would mediate a plea bargain with the aid of the prosecutor and defense attorney. In the second instance, mediation is an alternative that entirely replaces a criminal trial process. Part IV answers challenges leveled at restorative justice in the context of using restorative justice methods in cases of rape. Mediation in the cases of acquaintance rape will empower victims and address the needs of the offenders.

II. RAPE AND SEXUAL ASSAULT TODAY

Since the 1940s, the instances of rape have substantially increased.⁹ To understand the issue of rape and the ways in which this Note recommends that the criminal justice system evolve to properly address the issue of acquaintance rape, it is important to understand the prevalence of the problem and how the justice system currently handles the situation. Most rapes go unreported, and those that are reported are unsuccessfully managed by the justice system.¹⁰

A. *The Statistics and Definitions*

The statistics regarding rape illustrate the need to effectively deal with the problem as a society. The Rape Abuse & Incest National Network (RAINN) reported that one out of every six women in the United States has been a victim of rape or attempted rape.¹¹ Based on the 2000 National Crime Victimization Survey conducted by the Department of Justice, RAINN reported that there were 261,000 victims of rape, attempted rape, and sexual

⁹ GILMARTIN, *supra* note 4, at 23–25 (1994). According to official crime statistics from the FBI, rapes increased from 5.2 per 100,000 persons in 1940 to 41.2 per 100,000 persons in 1990. *Id.* Based on surveys and other data showing the substantial underreporting of rape, Gilmartin concludes that “the calculated rate of rape is at least double that of the FBI UCR.” *Id.* at 50. From 2001 to 2002, the number of reported rapes increased by four percent while total violent crime decreased by 0.2 percent. UNIFORM CRIME REPORTS (Jan.–Dec. 2002), available at http://www.fbi.gov/ucr/cius_02/02_prelimannual.pdf (last visited Jan. 26, 2004).

¹⁰ See *infra* Part II.A–C.

¹¹ RAINN Statistics, Women are victims . . . , available at <http://www.rainn.org/statistics.html#womenarevictims> (last visited Jan. 26, 2004); Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 12 (2000) (“More than half of these women were assaulted before the age of eighteen. Almost 900,000 attempted and completed rapes are perpetrated against adult women each year.”) (citing statistics from the Surgeon General).

assault in 2000.¹² In sixty-two percent of the rape cases, an individual she knew, such as a friend or an acquaintance, assaulted the victim.¹³ Of all types of rape, the majority went unreported.¹⁴ The implications for women are far-reaching and detrimental to their future.¹⁵

¹² RAINN Statistics, Dept of Justice Study Shows Rape Down, *available at* <http://www.rainn.org/stat.html> (last visited Jan. 26, 2004).

¹³ *Id.*

¹⁴ *Id.* ("Forty-eight percent of victims said that they reported the crime to police, up dramatically from last year's 28%. However, the BJS [Bureau of Justice Statistics] researchers cautioned that this subsample was too small to be reliable."). In a study from 1992–2000 conducted by the Federal Bureau of Investigation, the results indicated that only 36% of rapes and 34% of attempted rapes are reported. Rennison, *supra* note 2, at 1; see also GARY LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 63–65 (1989) (indicating that women typically will not contact police regarding sexual assault without outside influences encouraging them to do so); Judith E. Beals, *Ending the Silence on Sexual Violence*, BOSTON GLOBE, Apr. 10, 2000, at A19; Ken Rodriguez, *Silent Tears Flow in Wake of Sexual Assaults by Athletes*, SAN ANTONIO EXPRESS-NEWS, Jan. 27, 2002, at 3C (citing a national study indicating that "[f]or every rape reported to police, nine more go unreported"). There are multiple reasons victims give for not reporting rape: victims felt it was a personal matter, feared reprisal, wanted to protect the offender, or felt that the police were biased. Rennison, *supra* note 2, at 3. In addition to the reasons given by victims above, a social-psychological rationale also helps explain this phenomenon:

Curt Sobolewski, a sociology professor who studies rape, said the crime might go unreported because the victim is trying to block out the memory.

"A lot of people don't report it because if they don't report it, then it doesn't become reality," he said.

Other victims do not report the crime to avoid having to answer questions about their behavior and their character—or they are afraid that no one will believe them.

Adam Fabian, *Consent: Not a Clear-Cut Issue*, DAILY COLLEGIAN (Penn. St. Univ.), Oct. 1, 2003, at 1.

¹⁵ Goldfarb, *supra* note 11, at 62 ("For example, studies report that almost 50 percent of rape victims lose their jobs or are forced to quit in the aftermath of the crime."). General issues arise in most rape cases:

Following an assault, most people have a feeling of betrayal and lack of safety in the world, said Mary Anne Knapp, clinical social worker and therapist with the Center for Counseling and Psychological Services (CAPS). Victims feel shocked and overwhelmed, like there's nowhere safe for them to go.

Some people try to put it behind them, she said. But instead, victims find themselves afraid to go out alone, having nightmares and, in some cases, unable to sleep at all.

Fabian, *supra* note 14, at 1. Specific impacts of rape vary from cases to case. In the following situation, the woman suffered severe psychological damage:

In the weeks following the rapes, [the victim] became depressed and withdrawn and stopped attending classes. She attempted to commit suicide and sought

With the pervasiveness of rape, it is evident that rape is a societal problem. To deal with the issue effectively, it must be properly defined. Rape can be classified into two categories—aggravated rapes and acquaintance rapes.¹⁶ Aggravated rapes are typically perpetrated by strangers who utilize weapons and cause serious physical harm to the victim.¹⁷ In contrast, acquaintance rapes are characterized by a lack of physical force and physical injury to the victim.¹⁸ The law defines rape generally as “to force a woman ‘not your wife’ to engage in intercourse against her will and without her consent.”¹⁹

psychiatric treatment. After [the victim] filed a complaint against [the offenders] under the Virginia Tech’s Sexual Assault Policy, she learned that another male student athlete had advised [one of the offenders] that he should have ‘killed the bitch.’”

Goldfarb, *supra* note 11, at 66.

¹⁶ David P. Bryden, Forum on the Law of Rape: *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 317–18 (2000); Cheryl A. Whitney, Note, *Non-Stranger, Non-Consensual Sexual Assaults: Changing Legislation to Ensure that Acts Are Criminally Punished*, 27 RUTGERS L.J. 417, 418 (1996) (terming “acquaintance rape” as “non-stranger rape” and aggravated rapes as “stranger rapes”); *see also* Alford’s *Defensive Comments Insensitive and Poorly Chosen*, DAILY IOWAN, Oct. 10, 2002 (“Approximately two-thirds of rapes are committed by acquaintances.”).

¹⁷ Bryden, *supra* note 16, at 318; *see* SUSAN ESTRICH, REAL RAPE 4 (1987); JUDY H. KATZ, NO FAIRY GODMOTHERS, NO MAGIC WANDS: THE HEALING PROCESS AFTER RAPE 1–7 (1984) (providing a first-hand, detailed account of rape and the aftermath for the victim). For a detailed account of an aggravated rape, *see infra* note 37.

¹⁸ Whitney, *supra* note 16, at 445. Among cases of date rape, many similarities exist:

In an acquaintance rape, the woman involved is often voluntarily with the man who attacks her. He usually does not use a weapon and may not hit her; she usually doesn’t scream—out of fear, not out of physical inability—and she often has few severe marks or bruises afterward. The presence of semen in or on her body only shows that the two had sex, not that it was forced. There is rarely a witness to the rape.

Id. However, acquaintance rapes may involve force. *Id.* In a recent date rape case, physical force was alleged: After drinking, two student athletes returned to the male’s room where he proceeded to forcefully remove her clothing and hold down her arms while he raped her. The victim suffered “bleeding from her rectum and vagina” and the “woman’s shirt showed evidence of tearing under the arms.” Dan Mihalopoulos, *Favoritism Charges Linger in Iowa Star’s Assault Case*, CHI. TRIB., Nov. 29, 2002 at 1C; *see also supra* Part I.

¹⁹ ESTRICH, *supra* note 17, at 4–5.

B. Rape Law Today

Although rape law has changed significantly over time, mediation should be considered where reforms have failed. Historically, rape law focused on protecting a man's property right in a woman.²⁰ Rape law was a male law that worked to ensure male control over women's sexuality.²¹ Prior to the recent period of reform, it was very difficult for women to successfully protect their rights through rape prosecutions.²² For example, a case would rarely be prosecuted if there was any delay between the actual rape and the time the woman reported it to authorities.²³ Indeed, if the case went to trial, the courts were skeptical of any claims of rape.²⁴ Furthermore, in addition to

²⁰ Nicola Lacey, *Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law*, 11 CAN. J. L. & JURIS. 47, 53-54 (1998).

It is well known that the history of the offence of rape expresses a commitment not so much to sexual autonomy as to property rights: its essence was damage to the proprietary value of virginity or chastity to an 'owning' male rather than any recognition of a woman's interest in her own sexual freedom. In other words, the value of property to human (male) autonomy rather than the value of human (female) sexual autonomy was the object of the offence.

Id. at 53; Joshua Dressler, The Sixty-Eighth Cleveland-Marshall Fund Lecture, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409, 410 (1998) ("Rape law has been male-oriented at least since Biblical times.").

²¹ Dressler, *supra* note 20, at 410.

²² Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 18 (2000).

Despite these considerations, for most of the history of this country, legal recourse for violence against women has been unavailable or narrowly circumscribed. Even after states began to adopt increasingly effective criminal and civil remedies for rape and domestic violence, and even after federal civil rights protections for women expanded dramatically, federal civil rights law generally offered no relief for violence against women . . . [C]ases of rape committed by dates, boyfriends, acquaintances, and other nonstrangers are far less likely to result in prosecution and conviction than rapes by strangers. The response to such cases, as to cases of marital rape, is conditioned by the law's reluctance to interfere in ongoing relations.

Id. at 18, 24 (citations omitted).

²³ Dressler, *supra* note 20, at 416.

²⁴ *Id.* The author explains:

Second, in rape prosecutions in which consent was an issue, judges sometimes warned jurors that a rape charge "is easily made and once made, difficult to defend against even if the person accused is innocent." Juries were admonished "to examine the testimony" of the complainant "with caution" and to evaluate the complainant's testimony with special care, "in view of the emotional involvement of the witness

the woman's testimony, a third-party had to corroborate her testimony,²⁵ and a woman's reputation would be put on trial.²⁶ A woman was required to "physically resist her attacker"—saying "no" was not sufficient to prove rape.²⁷

In response to these obstacles for prosecutors in bringing successful rape prosecutions, legislatures passed laws designed to increase the reporting and conviction rates in rape cases.²⁸ Today, the resistance requirement has been eliminated or substantially minimized in most jurisdictions.²⁹ However, most states still do not recognize a woman's vocal protest alone as sufficient to prove lack of consent, a necessary element if a sexual act is to be considered rape.³⁰ Since the mid-1970s, a man could be convicted of rape under a negligence standard.³¹ This means that a man no longer has to intend to rape

and the difficulty of determining the truth with respect to alleged sexual activities carried out in private."

Id. (citations omitted).

²⁵ *Id.* The corroboration requirement was specific to rape. *Id.*

²⁶ *Id.* The process of trial is very difficult on the victims of rape:

Too often in this country victims of rape are humiliated and [harassed] when they report and prosecute the rape. Bullied and cross-examined about their prior sexual experiences, many find the trial almost as degrading as the rape itself. Since rape trials become inquisitions into the victim's morality, not trials of the defendant's innocence or guilt, it is not surprising that it is the least reported crime. It is estimated that as few as one in ten rapes is ever reported.

Harriett R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 764 (1985) (citing Representative Elizabeth Holtzman's floor statement).

²⁷ Dressler, *supra* note 20, at 416–17. In a rape case, the prosecutor was required to prove that the unwanted sexual intercourse was obtained by force or threat of force. Proof that a woman verbally rejected sexual intercourse would not suffice to prove rape, even if the refusal was admitted by the defendant, unless force was also proven. This requirement is commonly known as the resistance requirement. Bryden, *supra* note 16, at 355.

²⁸ ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* 7 (1999) ("The reforms had these goals: shifting the trial's emphasis from the victim's character to the defendant's conduct, increasing rape report and conviction rates.").

²⁹ *Id.* at 418–19. See SCHULHOFER, *supra* note 6, at 88–98 (discussing changes pertaining to force illustrated by two states).

³⁰ SCHULHOFER, *supra* note 6, at 255. "No meaning no" in the context of sexual intercourse is at the center of this issue. Often times, men do not interpret no as an outright refusal to proceed to sexual intercourse. Men will simply think they need to work a bit harder to convince the women to have sex. See Bryden, *supra* note 15, at 387 ("This belief has been attributed to 'the traditional sexual script in which women's role is to act resistant to sex and men's role is to persist in their sexual advances despite women's resistance.'").

³¹ SCHULHOFER, *supra* note 6, at 258–59.

a woman; an unreasonable belief that she has consented is sufficient to prove rape.³² The negligence standard is complicated by the fact that silence implies neither the granting nor the withholding of consent.³³ Additionally, rape shield laws were enacted to protect the victim from a brutal cross-examination—a woman's sexual history is an impermissible line of questioning for the defense attorney in certain circumstances.³⁴

C. Where Women Are Left After Rape Law Reform

Although progress has been made through judicial reform in the case of rape, women still face many obstacles in prosecuting rape cases. Even with reforms, the system is still a deterrent for women to seek justice.³⁵ First, the traditional views and stereotypes of women and rape still influence juries.³⁶

³² *Id.*

³³ *Id.* at 268 (providing a discussion of this issue).

³⁴ Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behavior*, 44 CATH. U. L. REV. 709, 716–18 (1995) (indicating that most states and the federal government enacted rape shield laws). In Missouri, the legislature enacted rape shield laws to specifically “provide the victims of sexual assault and rape with some protection against inappropriate questioning in court.” *Report of the Missouri Task Force on Gender and Justice*, 58 MO. L. REV. 485, 615–16 (1993). Rape shield laws typically exclude evidence of the victim's sexual history. *Id.* However, this information may be admitted in situations in which the defendant claims mistake—he argues that he believed the woman had consented. Fishman, *supra* note 34, at 719.

³⁵ Bryden, *supra* note 16, at 320:

[A] growing body of social-scientific evidence indicates that, contrary to reformers' expectations, the much-heralded evidentiary reforms have had little impact on reporting, processing, and conviction rates in rape cases. Although this evidence is not yet conclusive, it strongly suggests several tentative conclusions. First, women seem to be increasingly willing to report rapes. Anecdotal evidence indicates that juries are increasingly sympathetic to the prosecution. This progress, however, appears to be due mainly to evolving public attitudes toward acquaintance rape rather than specific legal changes, except insofar as national publicity accompanying the changes may have affected attitudes everywhere.

Id. (citations omitted).

³⁶ TASLITZ, *supra* note 28, at 19. The author explains how narrative themes impact the decisions of juries:

So strong is this theme that women who do speak are themselves seen as violent, aggressing against men. Accordingly, a woman who expresses a need for sexual attention and physical freedom while refusing to “go all the way” with a man is a “tease.” She is, on the one hand, consenting to intercourse because she surely knows that her behavior can lead only to that inevitable result, and we are all responsible for the foreseen consequences of our actions. On the other hand, she is heading

Contributing to this problem, the press frequently focus attention on “lurid rapes,” which are not representative of the most common types of rape.³⁷ Therefore, juries are not prepared to deal with the most common and most unreported³⁸ type of rapes due to conditioning by the media.³⁹ Secondly, even with rape shield laws, women are still revictimized through the trial

toward that outcome by using her enormous sexual power to torture the male, whom she knows has an uncontrollable need to possess her once she expresses her sexuality. She is thus both consenting to intercourse and deserving of some punishment for her vicious behavior; therefore, she is not really raped. Alternatively, a woman who instead of first voicing sexual needs, responds to an expression of male need with a firm “no,” or refuses to acknowledge or respond to the male’s efforts—in short, a woman who clearly communicates her own desire not to have sex—is viewed as “aloof” and hence equally aggressive, assaulting male prerogatives and feelings. If she had demurely expressed virginal fear or reluctance and by indirection or flight sought to stave off male advances, then her action would be acceptable. But a clear expression of her own wishes is unacceptable, angry, and deserving of punishment.

Id. at 19–20.

³⁷ *Id.* at 23. LaFree provides an example of lurid rapes:

One summer evening in 1977, Lloyd Jeffries, 32 years old, walked into a diner in downtown Indianapolis and ordered a cheeseburger. Martha Jones, 41 years old, took the order and began to prepare the food on a grill behind the counter. The customer and the cook were the only two people in the diner. After a few moments, Jeffries moved behind the counter, pulled a knife, grabbed Jones, and pushed her through the kitchen and out the back door of the diner. He then forced Jones into the trunk of his car and slammed the lid shut. After driving Jones to a location that she was later unable to identify, Jeffries bound her hands and raped and sodomized her at knifepoint. He then forced her back into the trunk and again began driving. When he stopped again they were in a wooded area. This time he forced Jones to have oral and anal sex, repeatedly threatened her with a knife, urinated on her, and sexually assaulted her with a stick. Jones begged Jeffries to release her. Instead, he began stabbing her in the back, neck, and arms. Later examination would reveal 25 stab wounds and a deep slash over her throat. Apparently convinced that she was dead, Jeffries left Jones lying on the ground, naked except for a shirt, covered in blood. Miraculously, Jones managed to crawl out of the woods and back to the main road before collapsing unconscious near the highway. A passing motorist saw her beside the road and called the police. When Jones regained consciousness, she was in an Indianapolis hospital.

LAFREE, *supra* note 14, at 1–2 (“All the names in these accounts are fictitious.”).

³⁸ Rennison, *supra* note 2, at 1–3. Only 36% of all rapes and 34% of attempted rapes are reported to police. *Id.* at 1. The rates of reporting are even more dismal when the victim knows her attacker—approximately 75% unreported when the rapist is a former/current boyfriend, 61% unreported when the rapist is a friend or acquaintance for completed rape, and 71% unreported for attempted rape. *Id.* at 3. Even when the rapist is a stranger, only 54% of victims report the incident. *Id.*

³⁹ See TASLITZ, *supra* note 28, at 17–18.

process.⁴⁰ Even in jurisdictions with rape shield laws, cross-examination remains especially painful for the victim because the defense attorney's goal is to discredit the victim in order to increase a defendant's chance of an acquittal.⁴¹ Through the adversarial process, women are not able to "tell their stories," as testimony is limited to responding to questions posed by the attorneys or the judge.⁴² This process does not empower women, but punishes them a second time in the course of seeking justice. It creates an environment where most rape cases are not prosecuted, and where most that are result in acquittal.⁴³

Beyond rape reform, arguments abound about the preponderance of the false claims of rape. Claims have been made that only two percent of all rape

⁴⁰ Beals, *supra* note 14, at A19; Cheryl Siskin, Recent Decision, No. *The "Resistance Not Required" Statute and "Rape Shield Law" May Not Be Enough—Commonwealth v. Berkowitz*, 66 TEMP. L. REV. 531 (1993) (describing failure of rape shield laws to operate effectively in Pennsylvania). *Contra* Cristina Carmody Tilley, *A Feminist Repudiation of the Rape Shield Laws*, 51 DRAKE L. REV. 45, 45 n.1 (2002) (arguing rape shield laws do not benefit women and the criminal justice process).

⁴¹ R. George Wright, *Cross-Examining Legal Ethics: The Roles of Intentions, Outcomes, and Character*, 83 KY. L.J. 801, 802 (1995) (addressing legal ethics). In the article, the author uses the case of a rape trial to illustrate "well-known problems in legal ethics":

The first problem can be vividly illustrated through a defense counsel's attempting to increase a rape defendant's chances of acquittal by means of a humiliating or degrading cross-examination of the victim where the attorney knows that the effects of that cross-examination are unlikely to significantly promote the accurate resolution of any relevant issue in the case. In such a case, the attorney engages in "cross-examination by harassment," with the intimidation or destruction of a probably truthful witness commonly being sought. Such tactics may also be calculated to establish an attorney's reputation as an especially vigorous cross-examiner of rape victims.

Id. (citations omitted).

⁴² Lacey, *supra* note 20, at 67.

Rape victims giving evidence in court are effectively silenced, caught between the equally inept discourses of the body as property, framed by legal doctrine but incapable of accommodating their experience, and the feminine identity as body, which pre-judges their experience by equating it with stereotyped and denigrating views of female sexuality—views which are themselves filtered through a variety of further prejudicial assumptions based on factors such as race and sexual orientation. This silencing effectively denies rape victims both the status of personhood and the chance to approach the court as an audience capable of acknowledging their trauma—a process which is arguably crucial to surviving the trauma and among the most important things which a public rape trial should achieve.

Id. at 62.

⁴³ See *supra* Part II.A–B.

claims are false.⁴⁴ Regardless of the controversy surrounding false claims, women are still underreporting actual rape.⁴⁵ The current system is a deterrent for women to seek justice in cases of rape. Therefore most rapes go unreported and most rapists go unpunished *and unrehabilitated*.

III. RESTORATIVE JUSTICE: AN ALTERNATIVE TO TRADITIONAL PROSECUTION

A. *The History of Restorative Justice*

Though there has been a movement away from it, restorative justice is considered to be the most common model for criminal justice throughout history.⁴⁶ In the modern era, the movement to return to the principles and practices of restorative justice came about in the mid-1970s.⁴⁷ Restorative justice posits that crime is an offense against the victim, those related to the victim, the offender, and other members of the community.⁴⁸ The ultimate goal of restorative justice is to mend the damage done to individuals and the community.⁴⁹ One practical purpose of restorative justice is to achieve a

⁴⁴ See Beals, *supra* note 14, at A19. *Contra* Edward Greer, *The Truth Behind Legal Dominance Feminism's "Two Percent False Rape Claim" Figure*, 33 LOY. L.A. L. REV. 947 (2000).

⁴⁵ See *supra* note 14 and accompanying text.

⁴⁶ John Braithwaite, *Restorative Justice: Assessing Optimistic and Pessimistic Accounts*, 25 CRIME & JUST. 1, 2 (1999) [hereinafter Braithwaite, *Assessing Optimistic*] ("Restorative justice has been the dominate model of criminal justice throughout most of human history for all the world's peoples. A decisive move away from it came with the Norman conquest of much of Europe at the end of the Dark Ages.") (citations omitted). Although there was a movement away from restorative justice for a period of time, its attractiveness continues to grow over time. According to Braithwaite, "[r]estorative justice is now a global social movement advocating transformation of the criminal justice system. There is no criminal justice system that it has yet actually transformed, but there are few it has not touched." John Braithwaite, *Restorative Justice and Social Justice*, 63 SASK. L. REV. 185, 185 (2000) [hereinafter Braithwaite, *Social Justice*].

⁴⁷ Richard Delgado, *Prosecuting Violence: A Colloquy on Race, Community, and Justice*, 52 STAN. L. REV. 751, 753-54 (2000) (citing the movement as a reaction to "perceived excesses of incarceration, as well as inattention to the concerns of victims").

⁴⁸ Gretchen Ulrich, *Widening the Circle: Adapting Traditional Indian Dispute Resolution Methods to Implement Alternative Dispute Resolution and Restorative Justice in Modern Communities*, 20 HAMLINE J. PUB. L. & POL'Y 419, 435-36 (1999) ("[C]rime is fundamentally a violation of people and interpersonal relationships, including not only the identified victim but also family members of the victim and offender, bystanders, and community members.") (quotations omitted).

⁴⁹ Braithwaite, *Assessing Optimistic*, *supra* note 46, at 5 ("Restorative justice is a process whereby all the parties with a stake in a particular offense come together to

resolution to personal conflicts through mediation as opposed to the retributive process of the justice system.⁵⁰

Unlike the current justice system, restorative justice focuses not only on punishment but also on helping the victim and the offender reintegrate into the community.⁵¹ Beyond reintegration, restorative justice empowers victims by allowing them to directly participate in the resolution of the dispute.⁵² The outcome of restorative justice should include future prevention and reintegration of the offender into society.⁵³ Ultimately, restorative justice

resolve collectively how to deal with the aftermath of the offense and its implications for the future.”) (quotations and citation omitted). Aspects of the community that are positively affected include “restoring property loss, restoring injury, restoring a sense of security, restoring dignity, restoring a sense of empowerment, restoring deliberative democracy, restoring harmony based on a feeling that justice has been done, and restoring social support.” *Id.* at 6. For the victim, the process itself is beneficial to healing and moving beyond the victimization. Martha Minow, *Between Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 NEW ENG. L. REV. 967, 969–70 (1998). In relation to the benefits to victims, Minow emphasizes that

[r]estorative justice can also afford victims the position of relative power represented by the capacity to forgive—whether or not the individual victims proceed then to forgive particular perpetrators. Where victims do forgive, it is as much from their own healing and embrace of a future without rage as it is for the benefit of the offender.

Id.

⁵⁰ Braithwaite, *Assessing Optimistic*, *supra* note 46, at 3. Unlike the criminal system, restorative justice moves beyond crime as an offense against the state. Leena Kurki, *Restorative and Community Justice in the United States*, 27 CRIME & JUST. 235, 265 (2000) (“[C]rime consists of more than violation of the criminal law and defiance of the authority of government.”) (citation omitted).

⁵¹ Ulrich, *supra* note 49, at 436–37. Some jurisdictions follow a “no drop” policy in cases of domestic violence, which implicate the ability of a woman to seek her preferable resolution to the problem. This policy illustrates how the current criminal justice system “deprive[s] or constrict[s] the victim’s choices and refuse[s] deference to her own assessment of the promises and perils of proceeding with prosecution.” Minow, *supra* note 50, at 977.

⁵² Ulrich, *supra* note 49, at 437 (“[I]n the prevailing system, the offender interacts with justice professionals rather than speaking directly with the victim and the community damaged by the crime in the prevailing system, and the system encourages the offender to minimize and deny his or her actions, rather than take responsibility for the harm caused.”).

⁵³ Kent Roach, *Criminology: Four Models of the Criminal Process*, 89 J. CRIM. L. & CRIMINOLOGY 671, 706–07 (1999). Minow explains that in “[s]eeking re-acceptance of the wrongdoers in society, restorative justice tries to build on the offenders’ capacities for accountability, understanding, and prevention of future offenses.” Minow, *supra* note 50, at 970.

focuses on remedying the harms caused rather than on retribution.⁵⁴ Because restorative justice takes both the victim and offender into account in the context of the entire community, restorative justice is better able to address the particular needs of the parties involved.⁵⁵

As applied to cases of acquaintance rape, victim-offender mediation allows the victim to directly participate in the justice process and serves as an opportunity for the victim to have a degree of control in the disposition of her rape case. The victim would have the opportunity to meet her attacker face-to-face and challenge him in a safe setting. Ultimately, the use of victim-offender mediation would lead to understanding between both the parties and a mediated outcome that is in the best interests of the victim, the offender, and the community.⁵⁶ Under this process, the woman would gain control and more self-confidence, while the offender would be able to receive help.

B. *Victim-Offender Mediation: A Practical Application of Restorative Justice*

Victim-Offender Mediation (VOM) is one of the most common applications of restorative justice.⁵⁷ VOM typically replaces a trial when a guilty plea has been acceded to.⁵⁸ If an agreement is reached in VOM, the court disposes of the case and no incarceration typically occurs.⁵⁹

⁵⁴ See Frederick W. Gay, *Restorative Justice and the Prosecutor*, 27 FORDHAM URB. L.J. 1651, 1652 (2000). When decisions need to be made by the prosecutor regarding a particular case, aspects of restorative justice aid in the decisionmaking process. *Id.* This is especially important as overcrowding does not allow for the tough on crime mentality:

Some prosecutors now recognize that they are the gatekeepers of the system. Their charging decisions, pre-trial detention positions and sentence recommendations go a long way in deciding which defendants flow to what level of supervision and/or incarceration. Once the prosecutor accepts his role as gatekeeper, it is a short jump to the paradigm shift from the "trail 'em, nail 'em, jail 'em" mentality that pervades the traditional criminal justice system, to the restorative justice mind set that considers every case in light of what outcome best addresses the needs of the victim, community and offender.

Id.

⁵⁵ *Id.* ("The restorative justice concept provides another path to pursue, one that addresses public safety demands while meeting the needs of the victim and the community far better than the tradition system."). Part of the reason that restorative justice is so successful is that it focuses on the *needs of individuals in each case*. *Id.*

⁵⁶ Goolsby, *supra* note 5, at 1203–05 (discussing the various benefits of mediation as an alternative to rape prosecution).

⁵⁷ Delgado, *supra* note 48, at 756.

⁵⁸ *Id.*

⁵⁹ *Id.* at 757.

VOM consists of four steps: "Intake, Preparation for Mediation, Mediation, and Follow-up."⁶⁰ During intake, the cases are screened for their appropriateness for mediation.⁶¹ To pass the screening process, both parties should have a desire to proceed through mediation.⁶² Once mediation has been selected, the mediator will meet individually with the victim and the offender in preparation for the mediation.⁶³ If, at the preparation stage, the mediator feels that either party is not ready or willing to mediate, the case is returned to the traditional judicial process.⁶⁴ During mediation, parties are expected to speak to each other explaining their version of the events and their feelings.⁶⁵ During the mediation, both parties must come to a mutually acceptable resolution to the dispute, which usually includes some form of restitution for the victim or an assignment of a work order.⁶⁶ Once an agreement has been reached, some oversight is necessary to ensure the agreement is carried out.⁶⁷ If the process breaks down at any point, the case is returned to the court.⁶⁸

The use of VOM provides many benefits to both the victim and the offender. Through VOM, the victim is able to explain her feelings and gain insight about the crime itself from the offender.⁶⁹ As for the offender, he has

⁶⁰ *Id.* at 756.

⁶¹ *Id.* at 756–57. Although mediation is not typically used for serious crimes in the United States, it has been used elsewhere in the world to deal with serious crimes. Kurki, *supra* note 47, at 240. ("In Germany, about 70 percent of both adult and juvenile cases in victim-offender mediation were violent crimes in 1995. Similarly in Austria, 73% of adult and 43% of juvenile cases were violent crimes in 1996.") (citations omitted).

⁶² Delgado, *supra* note 48, at 757.

⁶³ *Id.*

⁶⁴ *Id.* In cases of "serious violent crimes," 89% of victims indicated that they wanted to meet the offender in a Canadian survey. Kurki, *supra* note 47, at 270. Additionally, the survey found that "only 11 percent [of victims] would have refused to meet the offender in any circumstances." *Id.*

⁶⁵ See Delgado, *supra* note 48, at 757. Mediation focuses on making the "situation as 'right' as possible." Mark William Bakker, Comment, *Repairing the Breach and Reconciling the Discordant: Mediation in the Criminal Justice System*, 72 N.C. L. REV. 1479, 1480 (1994). The author explains the various goals of mediation: "(1) recognizing the violation by expressing the facts and feelings surrounding the incident, (2) restoring equity by negotiating a restitution agreement, and (3) addressing future intentions." *Id.* at 1489.

⁶⁶ Delgado, *supra* note 48, at 757.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 758. Mediation has the ability to avoid double victimization by empowering victims. Bakker, *supra* note 65, at 1502. Bakker explains the situation:

the opportunity to take personal responsibility for the crime and fashion the remedy jointly with the victim.⁷⁰ This process “empower[s] the victim while reducing recidivism among offenders.”⁷¹ VOM has been advocated in the instances of hate crimes⁷² and sexual assault on college campuses.⁷³

1. *VOM and Hate Crimes*

Although rape is not technically a hate crime, a parallel can be drawn between rape and hate crimes when looking at how the criminal justice system addresses each crime. In response to the rising occurrence of hate crimes, legislatures simply have extended “traditional values of the criminal justice system.”⁷⁴ This extension fails to achieve its goal of combating hate crimes because it does not provide opportunities for the criminal justice system to deal with the needs of the victims.⁷⁵ Addressing the needs of the victims is important since a significant proportion of hate crimes go unreported.⁷⁶ To have an impact on hate crimes, “it is essential that there be a system put in place that provides not only for punishment of the offender, but also for rehabilitation of the offender as well as reparation for the victim.”⁷⁷ VOM is a process that satisfies those goals.⁷⁸ In cases of acquaintance rape, VOM would provide for punishment of the offender while allowing for rehabilitation of the offender and reparations for the victim. Currently, the problem of rape is not being adequately addressed within the tradition

Many victims allege that criminal justice officials neglect their plight—that their suffering is secondary to the threat to social order. Even simple requests, such as for information regarding the crime or the offender, may fall on deaf ears. Thus, victims are said to be victimized twice: first by the perpetrator of the crime and then by a system that treats them impersonally.

Id. at 1494–95 (citations omitted).

⁷⁰ Delgado, *supra* note 48, at 758.

⁷¹ *Id.* (“It offers the hope that victims and offenders may come to recognize each other’s common humanity and that offenders will be able to take their place in the wider community as valued citizens.”).

⁷² Alyssa H. Shenk, Note, *Victim-Offender Mediation: The Road to Repairing Hate Crime Injustice*, 17 OHIO ST. J. ON DISP. RESOL. 185, 185 (2001).

⁷³ Rajib Chanda, *Mediating University Sexual Assault Cases*, 6 HARV. NEGOT. L. REV. 265, 265 (2001).

⁷⁴ Shenk, *supra* note 72, at 212.

⁷⁵ *Id.*

⁷⁶ *Id.* at 212 (“There are a myriad of reasons why hate crimes go unreported, one in particular being victims’ uncertainty whether perpetrators will be brought to justice.”).

⁷⁷ *Id.* at 212–13.

⁷⁸ *Id.* at 216–17.

criminal justice system, with less than forty percent of all acquaintance rapes being reported, and less than seven percent of rape prosecutions resulting in convictions.⁷⁹

2. VOM and Cases of Rape on College Campuses

In the case of sexual assault on college campuses, VOM provides an effective way of dealing with a difficult issue.⁸⁰ The goals of a university in the resolution of a sexual assault case include deterrence, education, reporting, and avoidance of re-victimization.⁸¹ These goals are the same for the case of sexual harassment in which mediation is appropriate.⁸² Because date rapes rarely result in a successful prosecution, there is little deterrence through the criminal justice system.⁸³ Therefore, a VOM process at a university would provide more deterrence.⁸⁴ Unlike a public trial, a mediation process would facilitate education of the offender.⁸⁵ Like the situation with hate crimes, rapes are underreported because of the inherent

⁷⁹ See *supra* notes 5, 9, 11, 38 and accompanying text.

⁸⁰ Chanda, *supra* note 73, at 269–72.

⁸¹ *Id.* at 286.

⁸² *Id.* at 278–80.

⁸³ *Id.* at 288–89. One study indicates that only “three out of forty-two cases” in acquaintance rape prosecutions result in conviction. Goolsby, *supra* note 5, at 1192 (citing H. KALVEN & H. ZEISEL, *THE AMERICAN JURY* 253 (1966)).

⁸⁴ Chanda, *supra* note 73, at 288–89. Chanda argues that the process through the university will offer more deterrence:

Deterrence is a function of both the nature and severity of the penalties a particular process can impose and the likelihood that the process will lead to such penalties.

University disciplinary procedures can impose a wide variety of penalties, from probation to mandatory community service to expulsion. However, it is important to note that the strongest penalty a university can impose is only expulsion.

Of course, it is also important to recognize that expulsion may be a strong deterrent to potential offenders. Expulsion, in and of itself, may be viewed as a punishment not much different from imprisonment. Furthermore, the consequences of expulsion may also seem particularly severe. For example, the offender may be shunned by his friends, embarrassed in front of his parents, and unable to attend another comparable school, thereby ruining his future employment prospects. These consequences may result in greater deterrence.

* * *

In sum, the deterrent effect of university disciplinary procedures depends in some respect on the value a potential offender attaches to membership in a particular university community.

⁸⁵ *Id.* at 295–96.

⁸⁵ *Id.* at 289–90.

“disadvantages of the adversarial process.”⁸⁶ A mediation alternative provided by the criminal justice system would eliminate many of the obstacles created by the traditional justice system in cases of rape.⁸⁷ Finally, a VOM process avoids re-victimization of the victim by allowing the victim to avoid testifying in a criminal court.⁸⁸

In addition to meeting the goals of the university, VOM addresses issues affecting the victims and offenders.⁸⁹ VOM allows for offenders to apologize to their victims.⁹⁰ Because the ultimate goal is not punishment, an offender may become better able to understand how his actions were unacceptable and should not be repeated.⁹¹ VOM in cases of acquaintance rape may reduce recidivism. Because of the involvement of the victim in establishing the penalties, the victim may be more likely to report a rape if she wants to avoid a severe punishment for the offender.⁹² Ultimately, mediation in the case of sexual assault is “an effective and beneficial process option for victims”⁹³

⁸⁶ *Id.* at 290.

⁸⁷ *Id.* at 292; *see also* Goolsby, *supra* note 5, at 1213–14 (calling for mediation in lieu of criminal prosecution for simple rape):

Mediation, a process in which the victim and offender meet with the aid of a neutral third party, avoids the bias of the criminal justice system against the rape victim. Mediation provides a victim with assistance in overcoming the feelings of powerlessness that resulted from the rape. Mediation also allows the victim and offender to confront each other and to deal with any miscommunication or misinterpretation of behavior that led to the rape. Ultimately, mediation allows an offender to face up to what he has done, while avoiding the stigma of a rape prosecution. Mediation, therefore, represents a more effective and more healing solution than the court system to the problem of simple rape in our society.

Id. (citations omitted).

⁸⁸ Chanda, *supra* note 73, at 292–93.

⁸⁹ *Id.* at 301–06.

⁹⁰ *Id.* at 302. The author explains how confidentiality affects the parties:

Second, the confidentiality of mediation allows admissions of fault or contribution without fear of an adverse verdict, as in a trial or university disciplinary procedure. Many mediated results often include an apology, and in many more mediations, apology plays a crucial process role in allowing the parties to move forward and structure their future relationship. The contrast of that from a trial is stark—in a trial, recognition of any blame is to be avoided at all costs, lest that be construed as an admission of guilt.

Id. (citations omitted).

⁹¹ *Id.* at 304 (“[I]f the victim thinks that the offender must really learn how to deal with similar situations in the future, then the agreement can require community service or sexual assault awareness training”).

⁹² *Id.* at 305.

⁹³ *Id.* at 318.

IV. COURT SANCTIONED MEDIATION FOR CASES OF ACQUAINTANCE RAPE

Given the large number of rapes that are perpetrated by an individual known to the victim and the reasons that lead to a lack of reporting by the victims,⁹⁴ mediation in cases of acquaintance rape seems to offer a logical alternative to the traditional criminal justice system.⁹⁵ Although reforms have taken place since the 1970s, these reforms have not eliminated the re-victimization of women or allowed them to reap the traditional benefits seen in a retributive system of justice.⁹⁶ Two approaches for mediation are possible in a case of acquaintance rape.

A. Two Processes of Mediation in Cases of Rape

Although others have called for mediation outside the context of the criminal justice system,⁹⁷ this Note calls for use of mediation within the context of the criminal justice system: 1) at the plea bargaining and sentencing stages, and 2) in lieu of prosecution. Mediation between the victim and offender during the plea bargaining stage will empower the victim, resulting in an opportunity for the two parties to better understand and learn from the incident and productively move forward. In lieu of any prosecution, mediation would serve as a replacement for criminal prosecution, but one in which the court is involved. This second situation is only necessary when the victim does not want to pursue the possibility of a trial. Both of these alternatives illustrate how mediation can address the continuing problems inherent in the criminal justice system.

⁹⁴ See *supra* notes 4–5, 11–13 and accompanying text.

⁹⁵ Statistics indicate that the severity of the crime does not implicate the effectiveness of mediation. Bakker, *supra* note 65, at 1513.

Despite the severity of the crime, studies indicate that many of the issues involved in these violent crimes are similar to those in non-violent settings. While mediation in more violent crimes is not extensive and the process takes much longer to develop, it appears to be a helpful experience for victims and offenders who willingly participate.

Id.

⁹⁶ See *supra* Part II.A–B.

⁹⁷ See Goolsby, *supra* note 5, at 1213–14.

1. *Mediating the Plea Bargain or Sentence in Rape Cases*

Mediation could be used to mediate a plea bargain before the rape case goes to trial.⁹⁸ Here, the offender, victim, prosecutor, and defense attorney should all be involved in the mediated outcome.⁹⁹ The outcome would be final and treated like any other plea bargain.¹⁰⁰

Additionally, after judgment is entered in a rape case the court should allow mediation of the sentence. The process would involve the prosecutor, defense attorney, offender, and victim. For mediation to occur, both the victim and the offender would have to agree to the mediation.¹⁰¹ During this mediation, the victim and offender would agree on the appropriate sentence, guided by the mediator with each side consulting with their respective legal representative.

Although mediation in cases of rape is rare, it occurred recently in Iowa.¹⁰² The case involved two student athletes.¹⁰³ The perpetrator, Pierce, was a well-known basketball player, and the incident may have been more violent than the typical acquaintance rape situation.¹⁰⁴ As in most

⁹⁸ Approximately 90% of all cases are pleaded. See Markus Dirk Dubber, *American Plea Bargains, German Lay Judges, and the Crisis of Criminal Procedure*, 49 STAN. L. REV. 547, 565 n.94 (1997) (citing various studies indicating that between five and fifteen percent of criminal cases go to trial in the United States depending on jurisdiction).

⁹⁹ The mediation could involve multiple interested groups including members of the victim's or offender's family. For the purposes of simplicity, only those parties directly involved or legally representing those directly involved would be parties to the mediation.

¹⁰⁰ In federal court, pleas are governed by a rule of procedure. FED. R. CRIM. P. 11. Under this rule, the court does not participate in discussions which could result in a plea agreement. FED. R. CRIM. P. 11(c). If an agreement is reached, the agreement is delivered in court publicly. FED. R. CRIM. P. 11(c)(2). The court must finalize the agreement: "[T]o the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report." FED. R. CRIM. P. 11(c)(3)(A). The court has the ultimate ability to decide how to dispose of the plea bargain. *Id.*

¹⁰¹ The prosecutor would not have to agree with the decision to mediate but should be ordered to participate as the victim's legal representative. See Mihalopoulos, *supra* note 18, at 1C (indicating prosecutor was not pleased with using mediation).

¹⁰² Mihalopoulos, *supra* note 18, at 1C.

¹⁰³ Brian Sharp, *Statement Illustrates Rape Claim*, IOWA CITY PRESS-CITIZEN, Nov. 19, 2002, at 1A. The defendant was Pierre Pierce, a successful basketball player, and the victim was an unidentified female athlete. *Another Victim in Iowa City: Official Secrecy in the Pierce Case Violates Iowa Open-records Law*, DES MOINES REGISTER, Nov. 27, 2002, at 18A (complaining about the police's refusal to release the name of the victim).

¹⁰⁴ See Witosky, *supra* note 8, at 1A. The version of the incident provided to police included indications of physical force greater than is usual in an acquaintance rape:

acquaintance rape cases, Pierce claimed the sex was consensual.¹⁰⁵ The mediation included Pierce, his attorney, the victim, and the victim's attorney; the victim, her family, Pierce, and the county attorney agreed to the outcome.¹⁰⁶ In the agreement, Pierce was required to attend counseling, was forbidden to have contact with the victim, was placed on probation for one year, and required to complete 200 hours of community service.¹⁰⁷

The woman was downtown drinking before the alleged attack, consuming three or four shots of rum and two mixed drinks in three hours. She arrived at Pierce's home asking for a ride home.

Former basketball player Reggie Evans said he was too drunk to drive, records show, but he gave the woman's roommate a ride. UI basketball player Chauncey Leslie, who lives with Pierce, brought the woman blankets and a pillow and directed her to a spare bedroom.

Pierce entered the room a few minutes later and laid down on the bed with her. She left to use the bathroom but returned because she could not find toilet paper. Pierce pulled her onto the bed and, after first resisting, she agreed to take off her shirt.

When he tried to remove her jeans, she turned away and 'stated she would not do that, and does not do that.' He persisted, removing her jeans and underwear as she tried to push him away.

After agreeing to oral sex, she stopped and began gathering her clothes. He pulled her into bed again and assaulted her, records show.

'When she tried to get away from him he would again pull her toward him,' Bok said in the statement. 'He took both of her arms, pinned them over her head and penetrated her. She continued to struggle and told him, 'I can't believe you did that to me.' And he stopped and got off her.

... 'medical records indicate that she suffered tearing and bruising to her vaginal and rectum areas.'

Sharp, *supra* note 103, at 1A.

¹⁰⁵ Brian Sharp, *Report: Pierce Claims Victim Initiated Acts*, IOWA CITY PRESS-CITIZEN, Nov. 20, 2002, at 1A. In contrast to the victim's story as reported in the victim's police report, Pierce claimed that the sex was consensual when interviewed by the police:

The report states that Pierce claimed he awoke to find the woman in his bedroom and that she climbed on top of him and began to voluntarily undress. She [allegedly] performed oral sex on him twice and they attempted intercourse twice. He stopped the first time when 'it seemed to cause the victim discomfort,' and was unable to penetrate the woman the second time, the report states.

After the woman began performing oral sex on him a second time and stopped, he turned on the lights in his bedroom and told her to leave, according to the report.

Id.

¹⁰⁶ *A Fast Break at Iowa: Some Say Former Chicagoland Hoops Star Got Off Easy After Being Accused of Rape*, CHI. TRIB., Dec. 2, 2002, at 36 [hereinafter *A Fast Break*].

¹⁰⁷ Mihalopoulos, *supra* note 18, at 1C. Note that while the county attorney signed off on the agreement, the prosecutor handling the case refused to do so. *Id.* The final charge to which Pierce pled guilty was "assault causing injury," a misdemeanor. *Id.*

In the *Pierce* case, the outcome benefited both the victim and the offender.¹⁰⁸ Both parties agreed to the resolution and the victim was able to receive a public apology from Pierce for his actions.¹⁰⁹ The resolution also empowered the victim to take the course of action that was best for her and handle the resolution of the situation on her own terms.¹¹⁰ Pierce was required to seek counseling;¹¹¹ it is hopeful that he will not offend a second time. If the case had gone to trial, it would have been very difficult case for the jury, given the conflicting “he said, she said” stories.¹¹² Successful rape prosecutions in similar cases are rare.¹¹³ Furthermore, if Pierce had received an acquittal he would not have been required to receive any help and would have been able to plausibly deny any wrongdoing.¹¹⁴ Overall, this case was disposed of in a way in which the offender was brought to justice, and the rights and needs of the victim were taken into account.

Mediation could also be used in sentencing. In the context of a recent murder case, the presiding judge ordered mediation of the sentence.¹¹⁵ During the mediation process, the defendants, two boys, finally admitted to killing their father.¹¹⁶ Although there are questions regarding whether the

¹⁰⁸ “No one wants to see two young lives ruined by this unfortunate incident.” Readers, *Was This ‘Justice?’: The University of Iowa and the Legal System are Under Fire for How They Handled the Pierce Case*, DES MOINES REGISTER, Nov. 24, 2002, at 20 (quote from Priscilla Wright, Iowa City).

¹⁰⁹ Witosky, *supra* note 8, at 1A.

¹¹⁰ *Id.* (“‘There seems to have been a real acknowledgement of the victim’s rights in this case and her need to exert control over the outcome,’ said Sharon Thomas, manager and clinical director of the Polk Country Rape-Sexual Assault Care Center.”).

¹¹¹ *Id.*

¹¹² See *supra* notes 104–05 and accompanying text.

¹¹³ See Goolsby, *supra* note 5, at 1190–91.

¹¹⁴ Even if it was not rape, the case exhibits serious issues between the parties and inappropriate, if not criminal, behavior, which society benefits from having remedied in some way.

¹¹⁵ Ginny Graybiel, *King Brothers Might be Moved to Juvenile Facility*, PENSACOLA NEWS JOURNAL, Dec. 10, 2002 (mediating the plea bargain). The facts in this case are disturbing:

Derek, 14, and Alex, 13, pleaded guilty last month to third-degree murder and arson in Terry King’s [their father’s] slaying and the burning of his Cantonment home on Nov. 27, 2001.

Derek, who bashed his 40-year-old father’s head with a baseball bat, was sentenced to eight years, to be served at one of the state’s two adult prisons designed for young offenders. Alex, who admitted to coming up with the murder plan, was sentenced to seven years, also to be served at one of those prisons.

Id.

¹¹⁶ *Id.*

mediated agreement will remain in force or whether the boys will be transferred to juvenile facilities,¹¹⁷ the mediation had a positive impact—the boys were able to openly admit what they did was wrong. Admitting guilt is an important aspect of recovery for the offender.¹¹⁸ Ultimately, the mediation process is likely to have had a positive effect on the boys—perhaps some of the effects of mediation have contributed to the movement to place the boys to a juvenile facility. In both the cases of mediation of the plea and sentence in rape and murder cases, mediation had positive effects for the victim and the offender.

Generally, the use of VOM to set a sentence or enter a plea bargain in rape cases has several benefits. It provides an opportunity for the victim and offender to meet in a safe environment. It may allow the victim to avoid embarrassing and difficult situations as a witness for the prosecution. VOM allows an offender an opportunity to apologize to the victim. Moreover, since the victim will have direct involvement in fashioning the outcome of her case, the victim may be able to regain the sense of empowerment taken away during the rape. Finally, the outcome is likely to be in the best interests of the offender, victim, and community.

2. Mediation as a Replacement for Criminal Prosecution in Rape Cases

If the victim wants to avoid a trial and the alleged offender is willing, the court should determine if mediation is an appropriate alternative in the particular case. If the court deems that the case is inappropriate for mediation, the court should treat the situation as though the alleged rape had never been reported for prosecution.¹¹⁹ This will allow for the victim to have

¹¹⁷ *Id.*

¹¹⁸ Ulrich, *supra* note 49 at 437. Mediation provides a better opportunity for offenders to come to terms with their behavior than the current justice system:

[T]he offender interacts with justice professionals rather than speaking directly with the victim and the community damaged by the crime in the prevailing system, and the system encourages the offender to minimize and deny his or her actions, rather than take responsibility for the harm caused. Critics of the criminal justice system argue that the offender is not given a chance to empathize with the victim—therefore an important deterrent to later crime is lost.

Id.

¹¹⁹ A woman should not be harassed into testifying in a trial by a prosecutor. If mediation is not an option, the woman should not be punished for initially coming forward when she could have stayed silent. However, this argument contradicts any “no-drop” policy. See Minow, *supra* note 50, at 975–79 (discussing benefits and drawbacks of no-drop policies).

more control over the situation and prevent her from being subjected to unwanted probing by the authorities or defense attorney in open court.¹²⁰ If mediation is deemed appropriate, mediation should proceed in the typical fashion¹²¹ subject to special features for this special type of mediation.

Specific criteria may be required in the final agreement. Since communication and mistake of fact tend to be issues in acquaintance rape,¹²² offenders should be required to attend an educational program as part of the sanction.¹²³ While this may take away some of the autonomy of the victim, it will help guarantee that education is an outcome of the mediation. This is especially important since offenders are typically not incarcerated through the VOM process.¹²⁴ One final provision that should be added is a probationary period outside of the mediated agreement. If the offender re-offends within a certain time period, the results of the mediation and specific facts of the first case should be admissible for non-propensity reasons, if the first victim agrees, in the second case.¹²⁵ Ultimately, the court will be enforcing any mediated agreement although incarceration will not be a possible outcome of the mediation. Ideally, the mediation agreement will restore both the victim and the offender into the community.

Although others have argued that mediation should be used as a replacement for prosecution,¹²⁶ the type of mediation supported in this section of the Note is used as part of the criminal justice system—the court will govern the outcome. Thus, the same benefits enjoyed through the use of mediation techniques mentioned in this Note should occur in the case of

¹²⁰ Exceptions to this policy may be necessary, especially if an “aggravated” rape is reported. There may be a greater interest in protecting the community than the victim’s autonomy in a case of “aggravated” rape.

¹²¹ See *supra* notes 57–73 and accompanying text.

¹²² SCHULHOFER, *supra* note 6, at 258–59.

¹²³ For crimes other than rape, sentences that involve education have become more widely utilized. See generally Gail Sasnett-Stauffer & E. John Gregory, *A Drug by Any Other Name is Still a Drug: Why the Florida Judiciary Should Start Treating DUI as Any Other Drug Offense*, 13 U. FLA. J.L. & PUB. POL’Y 299, 312 (2002) (stating that all DUI offenders must complete a DUI education program); Michael Tonry, *Intermediate Sanctions in Sentencing Guidelines*, 23 CRIME & JUST. 199 (1998) (discussing increased use of “intermediate sanctions” including treatment).

¹²⁴ Delgado, *supra* note 48, at 758 (“Because successful mediation serves in lieu of a trial, a defendant who cooperates and performs the agreed service will escape confinement entirely.”).

¹²⁵ Because incarceration time resulting from the first offense would not apply, it is important that the mediation agreement have some bite so as to deter the offender from re-offending.

¹²⁶ See Goolsby, *supra* note 5, at 1213–14 (arguing that mediation is appropriate for cases of simple rape and for excluding the criminal justice system entirely).

mediation in rape cases, exclusive of any trial process.¹²⁷ Additionally, this form of mediation will give women greater opportunity to pursue justice in the manner that they feel most comfortable.

B. Challenges to VOM and Answers in the Context of Rape Cases

The general challenges that have been raised against mediation in criminal cases apply to the use of mediation in rape cases. Because mediation occurs rarely, if at all, in rape cases,¹²⁸ specific challenges are more speculative but based, in part, on the criticisms levied at the disposition of the *Pierce* case.

1. General Objections to Mediation and Answers to the Criticism

One of the biggest challenges to VOM is consistency.¹²⁹ In the context of rape, inconsistency is the rule rather than the exception.¹³⁰ This conclusion can be drawn from the fact that the majority of rape cases are never reported.¹³¹ Therefore, few offenders go to trial and most never have to deal with the consequences of their actions.¹³² However, the goal of VOM is not to ensure identical outcomes in similar situations, but to make the parties and society better off.¹³³ It is better that the victim is able to gain some semblance of control over her life, and it is important for the offenders to take responsibility for their actions in some way.

¹²⁷ See *supra* Part III.

¹²⁸ See *supra* Part IV.A.1.

¹²⁹ Delgado, *supra* note 48, at 759–60 (“different victims and offenders may decide similar cases differently”).

¹³⁰ This statement is based on the underreporting of rape and the number of cases that go unprosecuted.

The relationship of victim and offender and the circumstances of their initial encounter appear key to determining the outcome of rape cases in virtually every study. A review of the case files in New York City’s district attorney’s office disclosed that one-third of the cases involving strangers, and only 7 percent of the nonstranger cases led to indictments; half the nonstranger cases were dismissed outright, compared to a third of the stranger cases. These numbers are consistent with an almost systematic downgrading or dismissing of cases involving nonstrangers, a policy confirmed and defended in newspaper accounts for all crimes in that office.

ESTRICH, *supra* note 17, at 18 (citations omitted).

¹³¹ See SCHULHOFER, *supra* note 6, at 128.

¹³² ESTRICH, *supra* note 17, at 18–19.

¹³³ See Braithwaite, *Assessing Optimistic*, *supra* note 46, at 6.

Although its proponents claim that restorative justice is effective in preventing crime and solving the problems created by crime, empirical data is lacking to prove that it is, in fact, an improvement over the current system.¹³⁴ Recidivism rates, crime rates, and victimization rates have not been systematically measured to determine the usefulness of alternative approaches to the criminal justice system.¹³⁵ However, studies have shown that most victims, offenders, and other individuals involved in the restorative justice process have been satisfied with restorative justice practices.¹³⁶ If the individuals who are involved with the process are satisfied, it is worthwhile to implement mediation in cases of rape, especially if it means that more victims will report rape. Reporting rates would increase, because the option of mediation is beneficial for the victim. Moreover, through mediation, the victim is able to confront the offender, tell her story, and gain some influence in the process.

Another challenge to VOM is that the offender is placed in a weakened bargaining position.¹³⁷ While in some respects this could be true, the rape victim does not have the power to send the offender to jail; the victim can only determine what kind of education or community service he might be required to complete.¹³⁸ In the case of plea-bargaining, the victim may ask for rehabilitation instead of jail time whereas a prosecutor may be more intent on jail time. Therefore, this "weakened" position may actually be worthwhile for the offender if it means avoiding jail time and the time and expense of a criminal trial.¹³⁹ Ultimately, mediation is predicated on the offender's agreement to participate. At any time, the offender has the option to risk a trial, which would have occurred if the victim had not requested mediation. Therefore, even if there is a potential power imbalance between

¹³⁴ Kurki, *supra* note 47, at 285 ("Although we know that face-to-face meetings are more humane and emotionally intensive than structured trials dominated by legal professionals, there is not yet evidence that the positive experience transfers to better results.") (citation omitted).

¹³⁵ *Id.*

¹³⁶ *Id.* Kurki stated that "[i]f cases are mediated, there is no doubt about success: in the vast majority of instances, victims, offenders, and other participants are satisfied, an agreement is reached, and a reparation plan is fulfilled by the offenders." *Id.* at 240.

¹³⁷ Delgado, *supra* note 48, at 760 ("VOM gives great power to the victim, and mediators and judges reinforce that power, placing defendants in an almost powerless position.").

¹³⁸ *See id.*

¹³⁹ Because rape convictions often bring with them heavier penalties and greater stigma than what would be set through a mediated agreement, it is possible that the offender could be faking sensitivity to avoid jail time. *See supra* note 87.

the parties, the offender's options are not foreclosed and mediation will allow him to avoid an unpleasant trial and potentially an unpleasant incarceration.

Moving beyond procedural concerns, a strong challenge to VOM is that it will not "spark[] [m]oral [r]eflection and [d]evelopment."¹⁴⁰ Although this may be the case when the victim and offender have had no prior contact other than the altercation that led to mediation, the case of mediation in acquaintance rape is different. In many cases, the victim and the offender have had a prior relationship or have at least known each other in a social manner.¹⁴¹ Furthermore, they may have a continuing relationship after the resolution of the case. Therefore, while it is possible that VOM in the cases of rape may not always have a positive impact on the offender, it is more likely that positive effects in the aggregate will be realized. Through mediation, the offender will have the opportunity for moral reflection, a greater likelihood of receiving counseling, and a better chance at reintegration to society. As society is educated about the mediation process, the community will be better equipped to honor the wishes of the victim and accept the offender back into society.

2. Challenges Leveled at Mediation in the Cases of Rape and a Response

In specific rape cases, members of the community not directly involved in the dispute may see VOM as abrogating justice.¹⁴² In the *Pierce* case, a university regent felt that the mediated settlement reached between the victim and offender did "not bring justice or serve the interests of the university."¹⁴³

¹⁴⁰ Delgado, *supra* note 48, at 765.

[I]t seems unlikely that VOM will produce the desired internal, moral changes in the offender. In theory, bringing the offender to the table to confront the victim face-to-face will enable him to realize the cost of his actions in human terms and to resolve to lead a better life. Some offenders may, indeed, have a crisis of conscience upon meeting the person she has victimized. But a forty-five minute meeting is unlikely to have a lasting effect if the offender is released to her neighborhood and teenage peer group immediately afterwards.

Id. (citations omitted).

¹⁴¹ CAROLINE A. FORELL & DONNA M. MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN 224 (2000) (finding 86% of women knew their rapist).

¹⁴² This was the situation in a rare mediated resolution to a case of acquaintance rape. Mihalopoulos, *supra* note 18, at 1C. For a description of the case, see *supra* Part IV.A.1.

¹⁴³ Mihalopoulos, *supra* note 18, at 1C. The reason the regent may have felt the resolution did not meet the interests of the university is that *Pierce* is still a member of the university's basketball team. See *id.* However, in response to this situation the university

Women's groups in the area believed that the mediated outcome discouraged women from coming forward with charges and that the new environment was "intimidating."¹⁴⁴ Furthermore, some members of the community felt that the victim did not stand up for herself when she decided to mediate the situation.¹⁴⁵ Although various groups have complained about the outcome of the *Pierce* case, it may have been the best resolution for that specific case. The same regent who complained about the process admitted that "the mediated resolution satisfied the perpetrator, the victim's family and the lawyers."¹⁴⁶ Most acquaintance rape cases are unreported and unsuccessfully prosecuted whether the offender is a popular sports star or not. Therefore, the mediation created an environment in which the offender was held accountable for his actions (whereas most offenders are not) and hopefully received help to become a better member of society.

Another criticism of mediation is that it is possible for the famous, wealthy, or powerful to receive special treatment in the process.¹⁴⁷ Although this is a possibility with or without mediation, in every instance of VOM prosecutors would be involved and courts would approve any plea agreement or mediation agreement under the proposed use of mediation. For example, in the *Pierce* case, where such dynamics became a concern, both the victim and the offender were satisfied with the outcome, and the court agreed to mediation.¹⁴⁸ The perpetrator was a basketball star, which may have led

could establish its own internal procedure to deal with cases such as this. *See, e.g., Code of Student Conduct*, §§ 3335-23-02-3335-23-04, available at http://studentaffairs.osu.edu/resource_csc.asp (last visited Jan. 26, 2004) (providing The Ohio State University with jurisdiction over sexual crimes occurring off-campus by OSU students); *see also supra* notes 103-117 and accompanying text (addressing the *Pierce* case).

¹⁴⁴ Mihalopoulos, *supra* note 18, at 12. This position was also supported by the university president who said that "[t]his whole situation really creates an environment that is perceived by many to be intimidating." *Id.*

¹⁴⁵ *Id.* ("I understand why [the victim] did what she did, but it hurts me as a woman to see her not standing up for herself," said Miranda Ball, 21, a senior at Iowa."). This point relates to the criticism that mediation is "soft" on crime. Bakker, *supra* note 65, at 1506-07. ("Thus, doubters claim that mediation may not elicit the public support necessary for such a transformation."). While this may potentially be the case, effective education may abrogate any possibility of widespread opposition to mediation because it is "soft" on crime.

¹⁴⁶ Mihalopoulos, *supra* note 18, at 12.

¹⁴⁷ *A Fast Break*, *supra* note 106, at 36 ("More than 2,000 people have signed petitions alleging that the university has given Pierce preferential treatment because he is a basketball player."). Speaking about the community reaction to the *Pierce* case, Iowa President Willard Boyd indicated that there was concern that "in the community that the athletes are treated separately." *Id.* (internal quotations omitted).

¹⁴⁸ *Id.*

individuals to feel that favoritism was involved.¹⁴⁹ If the community had been educated, it would have understood the process and recognized that a high-status offender was held accountable in a situation where accountability is rare. While there may be potential abuses based on status or position in the community, the proposed system provides enough oversight to prevent such problems.

Although mediation might preclude some victims from bringing rape charges,¹⁵⁰ the opportunity to mediate will actually encourage other victims to notify authorities. In the *Pierce* case, the victim chose to mediate.¹⁵¹ The victim had good reasons to mediate, including the desire to avoid further publicity of the case.¹⁵² However, because mediation in such cases is unusual, the process caused heightened criticism. Given the "he said, she said" circumstances and the fact that the offender was a basketball star, it is unlikely that the jury would have convicted the offender, even with the evidence of physical abuse.¹⁵³ The opportunity to mediate the plea bargain or sentence, or the use of mediation in lieu of prosecution, is simply an additional tool that will encourage more women to come forward and more offenders to be held responsible for their actions.

The opportunity to mediate does not prevent women from bringing rape charges; it provides them options to move forward and seek justice in a manner most appropriate for recovery. Most likely, mediation will have an empowering effect, allowing women to take control of their situations and pursue courses of action most suitable for them. Indeed, when the victim is involved in plea agreement or sentencing mediation, criminal penalties still apply and the victims can play a more direct role in the outcome of their

¹⁴⁹ See Mihalopoulos, *supra* note 18, at 1C.

¹⁵⁰ Mariel Mauck, *Pierce Sentence Too Light, Many Locals Say*, DAILY IOWAN, Nov. 4, 2002. Mauck cites a critic of the mediation process:

Linda Kroon, a program assistant in the Women's Resource and Action Center, said the outcome of *Pierce's* case could cause rape victims to think twice before reporting crimes. Authorities said the plea bargain was reached to protect the victim, a UI female athlete.

"Trials are never an easy process for victims of sexual assault cases," Kroon said. "Allowing perpetrators to bargain their way out of it has the potential to deter recent and future survivors of sexual assault about coming forward and pressing charges. It makes trials seem like another episode to be victimized."

Id.

¹⁵¹ Nothing in the articles about the case indicated that the victim was coerced into mediation. See *supra* Part IV.A.1.

¹⁵² Mihalopoulos, *supra* note 18, at 1C. The process of dealing with rape through the criminal justice system is not pleasant for women as explained earlier in this note.

¹⁵³ See *supra* Part II.

cases. And where mediation replaces prosecution, even without the threat of criminal sanctions, the offender is still held responsible for his crime. VOM can be the beginning of the path to healing for the victim. Furthermore, VOM is also the path for society to facilitate the accountability of rapists.

3. Impact of Mediation in Acquaintance Rape Cases

Although both general and specific criticism can be levied at mediation in the case of acquaintance rape, use of mediation is not just substituting one set of problems for those inherent in the current criminal justice system. First, the use of mediation is only an additional option to the traditional route. Because mediation is contingent upon agreement by both parties,¹⁵⁴ either party can choose to proceed through the traditional criminal justice process. Second, this Note advocates for mediation processes that take place within the context of the criminal justice system and not as an entire replacement.¹⁵⁵ Today most rape cases, numbering in the thousands, go unreported. In the end, the objective of reforming the justice system in cases of rape is to put the victim, offender, and community in a better position than that which the current system now affords. This means that the victim will be empowered to take her life back, the offender will take responsibility and receive treatment, and the community will better facilitate justice.

V. CONCLUSION

While rape law reform has reduced the obstacles to the enforcement of rape laws, reform has not created an ideal situation for women or an effective judicial process. Without abandoning the possibility of proceeding through the criminal justice system, court-sanctioned mediation in several different forms may provide a pivotal step in rape reform. Mediation would only be used in cases of acquaintance rape where the victim and offender are familiar with each other. The victim will have more control over the proceedings. Unless the victim refuses to testify at the trial, VOM can be used during the plea bargaining or sentencing phases of the criminal process. In the event that the victim does refuse the criminal trial process, the offender can still be held accountable through the use of court-sanctioned mediation in lieu of prosecution. The offender may come to understand how his behavior was inappropriate. In both cases, mediation will include an educational and rehabilitative component. In the end, the victim should feel empowered and the offender educated and determined not to make the same mistake twice.

¹⁵⁴ See *supra* Part IV.A.1-2.

¹⁵⁵ *Id.*

The addition of VOM in cases of rape will fill the gaps in rape law reform. By serving as an additional option, mediation does not substitute one set of problems for a second. It enhances the current system. While the public may not immediately see the value in the use of VOM in rape cases, increased usage and time may illustrate that the expected results are in fact a tangible reality. Allowing women to take a more active role in the disposition of their cases will enable them to reap the benefits of the criminal justice system and overcome their feeling of utter powerlessness resulting from their rape. It is clear that society is not managing the problem of rape effectively. However, in the future, as VOM becomes more common, it is likely that more than thirty-six percent¹⁵⁶ of rape victims will report their rape and seek help and justice. Through the criminal justice system, mediation offers the possibility of helping thousands of individuals, including both the victim and the offender. Mediation should be instituted in the plea bargaining stage of rape prosecution and as an alternative to the trial process itself.

¹⁵⁶ See *supra* note 16.